Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1721

No. 86-5259

In The

Supreme Court of the United States

October Term, 1986

NEW JERSEY TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 304,

Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent
New Jersey Transit Corporation
McCarter Highway & Market Street
P.O. Box 10009
Newark, New Jersey 07101
(201) 648-4335

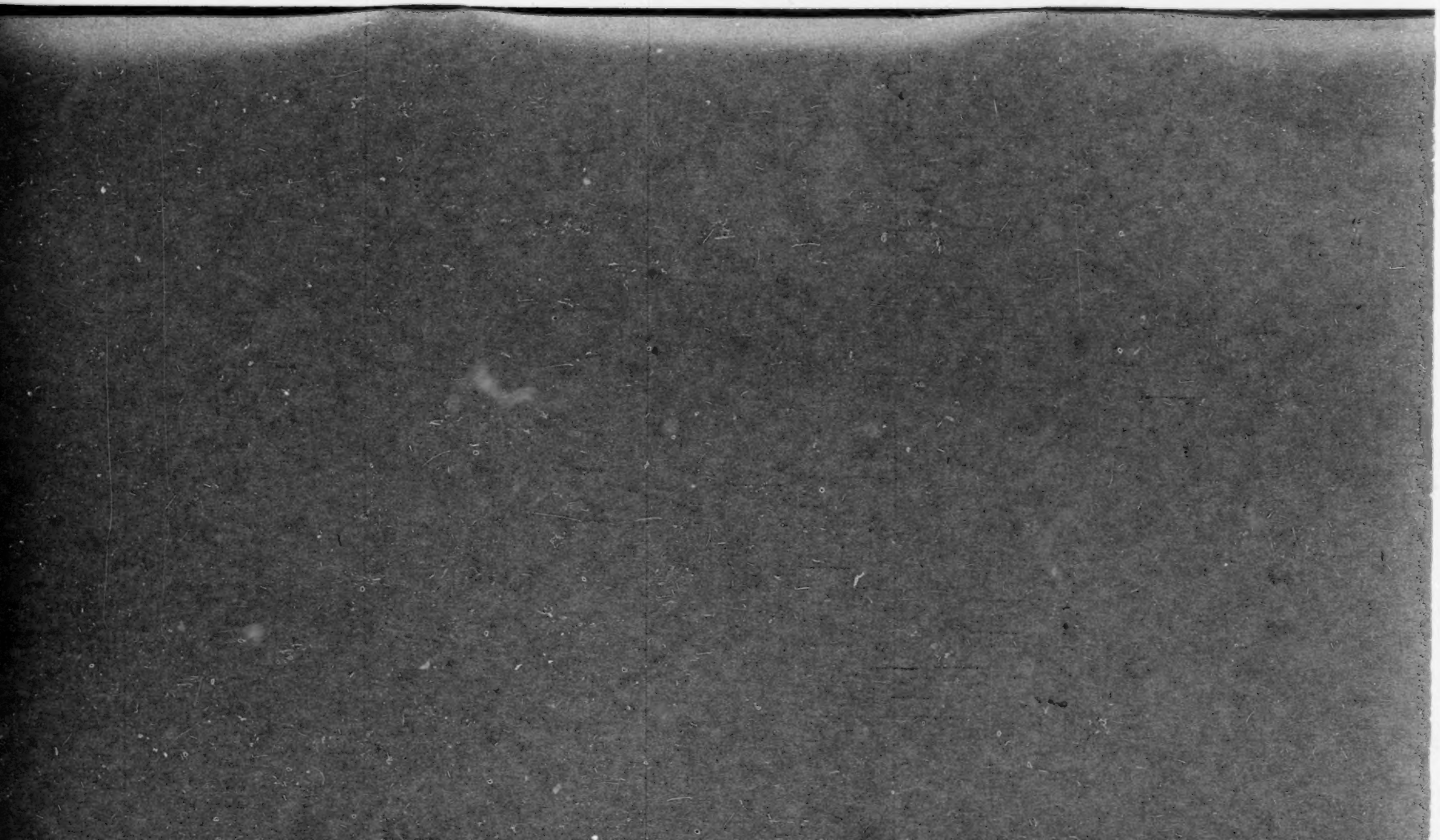
JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

JEFFREY BURSTEIN
Deputy Attorney General
Counsel of Record

ROBERT H. STOLOFF
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

BEST AVAILABLE COPY



STATEMENT OF QUESTION PRESENTED

When Congress exempted certain state operated commuter railroads from the jurisdiction of the Interstate Commerce Commission, did Congress also intend to change the application of a longstanding exemption from the Fair Labor Standards Act overtime provision; or did Congress, instead, continue the application of the exemption by virtue of a savings clause which provided for the continuing application of "provisions related to dealings between employees and employers"?

TABLE OF CONTENTS

Page

STATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW. 7

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY FOUND THAT 49 *U.S.C.* § 10504(c) SAVED, FOR RAILROADS LIKE NJ TRANSIT, THE CONTINUING APPLICABILITY OF THE FLSA OVERTIME EXEMPTION FOUND IN 29 *U.S.C.* § 213(b)(2). 9

CONCLUSION 16

APPENDIX (Opinion of District Court on Motion for Reargument) 1a

TABLE OF AUTHORITIES

Page

CASES CITED

California v. Taylor, 353 *U.S.* 553 (1957) 7

Commissioner of Internal Revenue v. Engle, 464 *U.S.* 206 (1984) 9

Garcia v. San Antonio Metropolitan Transit Authority, 469 *U.S.* 528 (1985) 6, 8

Keele v. Union Pacific Railroad Company, 78 *F. Supp.* 678 (S.D. Cal. 1948) 11

Kokoszka v. Belford, 417 *U.S.* 642 (1974) 9

McComb v. Southern Weighing and Inspection Bureau, 170 *F.*2d 526 (4th Cir. 1948) 12

Phillips v. Walling, 324 *U.S.* 490 (1945) 13

Richards v. United States, 369 *U.S.* 1 (1962) 9

Southland Gasoline Co. v. Bayley, 319 U.S. 44 (1943) 14

United States v. United Continental Tuna Corp., 425 *U.S.* 164 (1976) 14

United Transportation Union v. Southeastern Pennsylvania Transportation Authority, 555 *F. Supp.* 1382 (Sp. Ct. R.R.R.A. 1982), *cert.* den. 460 *U.S.* 1023, 462 *U.S.* 1135, 464 *U.S.* 822 (1983) 1

STATUTES CITED

N.J.Stat. 27:25-4(f) 3

N.J.Stat. 32:1-35.50 *et seq.* 7

N.J.Stat. 32:2-6 and 2-7 7

Northeast Rail Services Act of 1981, Pub. L. No. 97-35 (August 13, 1981), 95 Stat. 57, 369 1

29 *U.S.C.* § 141 *et seq.* 4

No. 86-5259

In The
Supreme Court of the United States
October Term, 1986

NEW JERSEY TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 304,
Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The pertinent facts with respect to the issue before this Court were never in dispute. Respondent New Jersey Transit Corporation ("NJ Transit") is a state-run commuter railroad that, on January 1, 1983, pursuant to the Northeast Rail Services Act of 1981, Pub. L. No. 97-35 (August 13, 1981), 95 Stat. 57, 369, assumed commuter rail service in New Jersey formerly operated by Conrail. *See United Transportation Union v. Southeastern Pennsylvania Transportation Authority*, 555 *F.Supp.* 1382 (Sp. Ct., R.R.R.A. 1982) *cert.* den. 460 *U.S.* 1023, 462 *U.S.* 1135, 464

U.S. 822 (1983). On May 20, 1985 petitioner New Jersey Transit Policemen's Benevolent Association, Local 304 filed a complaint in the United States District Court for the District of New Jersey alleging that NJ Transit's failure to pay overtime to police officers performing certain work in excess of forty hours a week constituted a violation of the overtime provisions of the Fair Labor Standards Act ("FLSA"). 29 *U.S.C.* § 207. NJ Transit then moved to dismiss the complaint based upon an exemption from the Fair Labor Standards Act found in 29 *U.S.C.* § 213(b)(2).

The district court denied the motion to dismiss, finding that when Congress exempted NJ Transit from Interstate Commerce Commission jurisdiction, 45 *U.S.C.* § 10504 (b), it effectively repealed for railroads like NJ Transit the preexisting exemption found in 29 *U.S.C.* § 213(b)(2). However, finding that the motion raised "a controlling question of law as to which there is a substantial ground for difference of opinion" the district court certified the matter for an interlocutory appeal (Pet. 48a). NJ Transit's petition for permission to appeal was granted by the Third Circuit. On December 2, 1986, with Judge Garth dissenting, the Third Circuit reversed the district court order, finding that NJ Transit was exempt from the overtime provisions of the Fair Labor Standards Act. On January 27, 1987, the Third Circuit denied petitioner's request for a rehearing *en banc*, with only Judge Garth dissenting (Pet. 49a).

The opinions of the majority and dissenting judges in the Third Circuit, as well as the district court, all recognized the basic statutory structure of the statutes to be

considered in this matter. In the first instance, 29 *U.S.C.* § 213(b)(2) exempts railroads subject to the Interstate Commerce Act from the overtime provisions of the Fair Labor Standards Act. Moreover, NJ Transit is the type of railroad generally subject to the Interstate Commerce Act. 49 *U.S.C.* §§ 10102(4) and (19), 10501(a)(1). However, 49 *U.S.C.* § 10504(b) exempts railroads, like NJ Transit, whose fares are controlled by a governor, *N.J.Stat.* 27:25-4(f), from the jurisdiction of the Interstate Commerce Commission (ICC). Obviously, if the interpretation of the statutes were to stop with 49 *U.S.C.* § 10504(b), because that provision exempts NJ Transit from the Interstate Commerce Act, NJ Transit would not be entitled to the exemption from the Fair Labor Standards Act found in 29 *U.S.C.* § 213(b)(2).

However, 49 *U.S.C.* § 10504 does not end with subsection (b). Subsection (c) has a savings clause which provides as follows:

> Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to the applicable laws of the United States related to—
>
> (1) safety;
>
> (2) the representation of employees for collective bargaining; and
>
> (3) employment retirement, annuity, and unemployment systems *or other provisions related to dealings between employees and employers.* [Emphasis added]

Thus, the question presented is whether the exemption from the FLSA overtime provision found in § 213(b)(2) is a "provision related to dealings between employees and

employers" for which continuing applicability to NJ Transit is saved pursuant to 49 *U.S.C.* § 10504(c).

The majority of the Third Circuit reviewed the statutory language and found it to be unclear. The court then reviewed the statutory purpose of both 49 *U.S.C.* § 10504 and 29 *U.S.C.* § 213(b)(2). The court recognized that the FLSA overtime exemption found in 29 *U.S.C.* § 213(b)(2) was part of a broad statutory scheme which treated railroad workers and their employers differently than other industrial workers.

> Thus, the Railway Labor Act, 45 *U.S.C.* § 151, *et seq.*, rather than the Labor Management Relations Act, 29 *U.S.C.* § 141, *et seq.*, governs labor-management relations in the railroad industry. Other examples include the Railroad Retirement Tax Act, 45 *U.S.C.* § 3231, *et seq.*, the Railroad Retirement Act of 1974, 45 *U.S.C.* § 231, *et seq.*, the Railroad Unemployment Insurance Act, 45 *U.S.C.* § 351 *et seq.*, the Federal Employee Liability Act, 45 *U.S.C.* § 54, and the Hours of Service Law, 45 *U.S.C.* § 61. All of these statutes were in force in 1976 immediately prior to the passage of Section 10504. [Pet. 7a]

The majority also recognized that all of the above cited laws were made applicable to railroads by reference to the Interstate Commerce Act (Pet. 8a). Finally, as was also recognized by both the District Court and the dissent, the majority noted that all these other laws are unquestionably saved by 49 *U.S.C.* § 10504(c) (Pet. 9a). Considering the statutory context and the language of 49 *U.S.C.* § 10504 the court stated:

> we believe the sweeping reference to "other provisions related to dealings between employees and employers" reflects a Congressional intent to preserve

> the regulatory status quo with respect to other statutes in the area of employment relations whose applicability might have been altered by changing the ICC's jurisdiction.
>
> In this context, we think it highly unlikely that Congress used the phrase "subject to applicable laws of the United States" to indicate that only statutes affirmatively regulating railroad activity, and not exemptions, were to be preserved. The district court's reading of this phrase necessarily attributes to Congress a decision to impose a hybrid and unique regulatory environment on this small subclass of railroads, one involving both the special railroad employment statutes and the FLSA overtime rules. . . . we can perceive no reason why Congress might wish commuter rail lines whose rates are controlled in this manner to be subject to the overtime provisions of the FLSA while other commuter rail lines remain entitled to the Section 213(b)(2) exemption. In short, consideration of the purpose of Section 10504 and the regulatory context in which it was enacted strongly suggests that the savings clause was intended to preserve the status quo across the entire spectrum of railroad employment regulation. [Pet. 9-11a]

The majority also specifically rejected the suggestion by both the dissent and the district court that the rule of narrow construction of Fair Labor Standards Act exemptions required a different result. Specifically, the court noted that the meaning of the long-standing exemption found in 29 *U.S.C.* § 213(b)(2) was not the subject of interpretation in this case. The meaning of that statute was clear. Rather the question presented in this matter is whether 49 *U.S.C.* § 10504(c) saved the application of that exemption when Congress exempted certain railroads from Interstate Commerce Commission jurisdiction. The ma-

jority also rejected a suggestion by the district court and the dissent that this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 *U.S.* 528 (1985), which had found the federal government could constitutionally impose minimum wage and overtime requirements on state governments, governed the decision in this case. The majority noted that Garcia dealt with a different statutory provision than is the subject of this case (Pet. 8a, n.1).

Finally, the Third Circuit reviewed the statutory history of 49 *U.S.C.* § 10504 and found no evidence of a Congressional intent to change the longstanding FLSA overtime exemption provided to interstate railroads.

> Finding no such expression here in the legislative history and further finding in the statutory text a strong indication that Congress intended to maintain the status quo in the area of employment relations, we hold that Section 10504 does not deprive N.J. Transit of its exemption from the overtime provisions of the FLSA. [Pet. 12a]

SUMMARY OF ARGUMENT

This matter presents a straightforward case of statutory construction which raises no important questions of federal law. The decision of the Third Circuit correctly applied the rules of statutory construction in concluding that 49 *U.S.C.* § 10504(c) saved, for railroads like NJ Transit, the continuing application of the FLSA overtime exemption found in 29 *U.S.C.* § 213(b)(2).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW.

Rule 17 of this Court's Rules provide that a petition for a writ of certiorari will be granted only where there are special and important reasons. In the instant matter, petitioners suggest the importance of this matter by raising the specter that the Third Circuit's decision could apply to 49 publicly owned railroads located throughout the country.* However, petitioner is unable to cite to the Court one other example of a publicly operated commuter railroad whose fares are subject to the control of a governor. It is only such railroads that are governed by the Third Circuit opinion. In fact, other than respondent NJ Transit, there is only one other commuter railroad in the country, the Port Authority Trans Hudson Corporation ("PATH"), whose fares are controlled by a governor. *N.J.Stat.* 32:1-35.50 *et seq.* and 32:2-6 and 2-7. Like NJ Transit, PATH operates commuter service from northern New Jersey to New York City. Thus, the Third Circuit's decision has only limited application in the Northern New Jersey/New York City region contrary to petitioner's assertion of nationwide implications.

---

* In a footnote on page 12 of the Petition, petitioner cites a document called *Profiles of 475 Local and Regional Railroads*, Association of American Railroads, June 1986. A review of that document reveals that it is a compilation of small freight railroads throughout the country like the railroad that was the subject of this Court's decision in *California v. Taylor*, 353 *U.S.* 553 (1957). However, 49 *U.S.C.* § 10504 provides an exemption from Interstate Commerce Commission jurisdiction for rail mass transportation, not rail freight.

Citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 *U.S.* 528 (1985), petitioner also suggests that the Third Circuit has ignored the process by which Congress has extended the Fair Labor Standards Act to various segments of public employment. However, as the court noted in *Garcia*, that process has been one under which Congress has extended to public employers the same requirements as applied to private employers. 469 *U.S.* at 554. However, in this case, recognizing, as the Third Circuit did (Pet. 8a), and as is not disputed by either the dissent or petitioner, that the reference to the Interstate Commerce Act found in 29 *U.S.C.* § 213(b)(2) is definitional, petitioner would have this Court extend the FLSA overtime provision to a publicly operated interstate railroad where it would not extend to a similarly situated privately operated railroad. Nothing in the history of the Fair Labor Standards Act or in the Court's decision in *Garcia* suggests such a result. Moreover, no evidence has been presented that Congress intended to affect the application of the Fair Labor Standards Act when it exempted railroads like NJ Transit from regulation by the Interstate Commerce Commission. Thus, rather than raising broad constitutional questions concerning the role of the national and state governments in our federal system of government, this matter involves a narrow issue of statutory construction affecting two New Jersey commuter railroads and their employees.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY FOUND THAT 49 U.S.C. § 10504(c) SAVED, FOR RAILROADS LIKE NJ TRANSIT, THE CONTINUING APPLICABILITY OF THE FLSA OVERTIME EXEMPTION FOUND IN 29 U.S.C. § 213(b)(2).

Both the majority and dissent in the Third Circuit, as well as the district court and petitioner, recognize that the statute requiring interpretation in this matter is 49 *U.S.C.* § 10504(c). In interpreting that statute the Third Circuit first noted that where statutory language is unclear, the Court should review the legislative history, "mindful of the statute's object and policy and must read the disputed provision in the context of the entire statute and the provisions of related statutes. *Richards v. United States,* 369 *U.S.* 1, 11 (1962); *Commissioner of Internal Revenue v. Engle,* 464 *U.S.* 206, 217 (1984); *Kokoszka v. Belford,* 417 *U.S.* 642, 650 (1974)." (Pet. 5a) In this case, after reviewing the statutory language, the majority found the statute to be unclear. Indeed, while at times calling the statute clear, both the District Court and the dissent also found it to be awkward, redundant (App. 9) and ambiguous (Pet. 14a).

A review of the statute confirms the Third Circuit's judgment that it is ambiguous. 49 *U.S.C.* § 10504(c) provides as follows:

> Notwithstanding subsection (b) of this Section, a local public body, described in subsection (b), *is subject to the applicable laws of the United States related to*—
>
> 1) safety;
>
> 2) the representation of employees for collective bargainings; and

> 3) employment, retirement, annuity, and unemployment systems or *other provisions related to dealings between employees and employers.* [Emphasis added to highlight portion of statute which requires interpretation.]

The use of such broad terms as "applicable laws" and "other provisions" does not clearly define what statutes were intended to be saved. These words do suggest, however, an intent to save a broad class of statutes. Moreover, it should be noted that the precise portion of the statute which must be interpreted is indisputably awkward and redundant. Specifically, 49 *U.S.C.* § 10504(c) saves "applicable laws of the United States related to . . . other provisions related to dealings between employees and employers."

Petitioner suggests that by using the words "subject to" at the beginning of this lengthy phrase Congress intended to only save whole statutes like the Railway Labor Act and the Railroad Retirement Act, but not exemptions from statutes. However, at most, this argument may point to another ambiguity in the statute; it does not establish that 49 *U.S.C.* § 10504(c) clearly does not include the FLSA overtime exemption. While the words "subject to" might not be the first words one would use in referring to an exemption, a party can be "subject to" an exemption. This is particularly true where the words "subject to" are followed by broad categories such as "applicable laws" and "other provisions". Moreover, in this case it should be recognized that the statute, 49 *U.S.C.* § 10504(c), is unquestionably awkwardly written. It defies common sense to conclude that the same draftsman that wrote "subject to applicable laws related to . . . other provisions related

to dealings between employees and employers'' specifically intended by the use of the words ''subject to'' rather than the words ''subject of'' not to include exemptions within the perview of the statute. As the Third Circuit correctly held, ''[t]extual parsing, especially here, is not alone an indisputable indication of Congressional intent.'' (Pet. 7a).

Given that the meaning of the savings clause found in 49 *U.S.C.* § 10504(c) is unclear, its meaning must be determined with a view both to the purpose of 49 *U.S.C.* § 10504 as well as related statutes. In this case the related statutes are 49 *U.S.C.* § 10504(b) and 29 *U.S.C.* § 213 (b)(2). As was recognized by both the District Court and the majority, 49 *U.S.C.* § 10504(b) was adopted because Congress determined that Interstate Commerce Commission regulation of certain publicly operated commuter railroads was unnecessary. In addition, 49 *U.S.C.* § 10504(c) clearly saved a number of statutes which apply to railroads and their employees: the Railway Labor Act, 45 *U.S.C.* § 151, *et seq.;* the Railroad Retirement Tax Act, 45 *U.S.C.* § 3231 *et seq.;* the Railroad Retirement Act of 1974, 45 *U.S.C.* § 231 *et seq.;* and the Railroad Unemployment Insurance Act, 45 *U.S.C.* § 351 *et seq.* In addition, the legislative history of 29 *U.S.C.* § 213(b)(2) clearly indicates that the FLSA overtime exemption was part of the separate statutory scheme, including the above cited statutes, which treated railroads and their employees differently than other industrial workers.

A detailed discussion of the statutory history and purpose of § 213(b)(2) is found in *Keele v. Union Pacific Railroad Company,* 78 *F.Supp.* 678 (S.D.Cal. 1948). A review of the statutory history reveals that, although the exemp-

tion refers to the Interstate Commerce Act, the exemption was not passed because railroads are subject to the jurisdiction of the Interstate Commerce Commission. Instead, the exemption was included in the FLSA because of the broad statutory scheme which has treated railroad employees differently than other industrial employees. As was stated by the Court in *Keele*, as initially reported out of committee the Fair Labor Standards Act only exempted those railroad employees covered by the Hours of Service Act. 78 *F.Supp.* at 681. However, on the floor of the House the bill was amended to exempt "any employee of an employer subject to Part I of the Interstate Commerce Act." 78 *F.Supp.* at 682. The Court in *Keele* went on to quote Congressman Mead's statement as to the reason for that amendment:

> For a long period of time the House has eliminated the railroad workers from various acts which apply to industrial workers. This was done in the case of the Wagner Labor Relations Act, 29 *U.S.C.A.* § 151 *et seq.*, again in the passage of the Social Security Act, 42 *U.S.C.A.* § 301 *et seq.*, and prior to that in the passage of the National Recovery Act, 48 Stat. 195. The railroads and the railroad industry have their own social and labor legislation. As you know, they have the Adamson Hours of Service Act, the Railroad Labor Act with its Mediation and Arbitration Boards, and they have the Railroad Retirement Act, 45 *U.S.C.A.* § 201 *et seq.* Therefore there is sufficient precedent for the Committee to accept the amendment of the distinguished Gentlemen of Ohio (Mr. Crosser) *and in doing so eliminate all railroad workers from provisions of this bill.* [Emphasis added]

78 *F.Supp.* at 682; *McComb v. Southern Weighing and Inspection Bureau*, 170 *F.*2d 526, 530 (4th Cir.,1948). Thus, the exemption from the FLSA overtime provision was

intended to be part of the overall statutory scheme of treating railroad workers differently than other industrial workers. Because NJ Transit is subject to all these other laws referred to by Congressman Mead, *see* 45 *U.S.C.* § 591; 49 *U.S.C.* § 10504(c), it would be consistent with the broad statutory scheme and Congressional purpose that NJ Transit would be exempt, like other railroads, from the overtime provisions of the Fair Labor Standards Act. Thus, the Third Circuit correctly found that "consideration of the purpose of Section 10504 and the regulatory context in which it was enacted strongly suggests that the savings clause was intended to preserve the status quo across the entire spectrum of railroad employment regulation." (Pet. 11a)

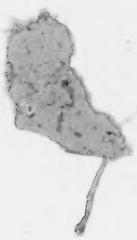
Petitioner also suggests that the holdings of this court requiring narrow construction of FLSA exemptions require a finding that § 10504(c) did not save the continuing application of the exemption found in 29 *U.S.C.* § 213(b)(2). However, petitioner concedes that the statute that must be interpreted in this matter is not the FLSA overtime exemption found at 29 *U.S.C.* § 213(b)(2), but rather the savings clause found at 49 *U.S.C.* § 10504(c). At the time 49 *U.S.C.* § 10504(c) was passed, the exemption from the FLSA overtime provisions for interstate railroads had been in existence for almost forty years. Moreover, with respect to interstate railroads the reason given for narrow construction of FLSA exemptions is not applicable. As this Court noted in *Phillips v. Walling,* 324 *U.S.* 490, 493 (1945), FLSA exemptions should be narrowly construed because the purposes of the Fair Labor Standards Act were humanitarian and remedial. However, with re-

spect to railroads, as this court recognized in *Southland Gasoline Co. v. Bayley*, 319 *U.S.* 44, 48-49 (1943), the Hours of Service Law provides a separate remedial statute regulating the work hours of railroad employees. 45 *U.S.C.* § 61 *et seq.* It is submitted that given the longstanding existence of the FLSA overtime exemption for interstate railroads and the existence of an alternate remedial statute there is no reason to narrowly construe the savings clause as it applies to the FLSA overtime exemption for interstate railroads.

The primary flaw in the reasoning of both petitioner and the dissent is their narrow focus on 49 *U.S.C.* § 10504 (c), without giving consideration to the related statutes. Thus they emphasize that the record with respect to 49 *U.S.C.* § 10504(c) lacks evidence of Congressional intent to provide the overtime exemption to railroad like NJ Transit. (Pet. 17a, Pet. 10). However, it is petitioner that is arguing that 45 *U.S.C.* § 10504 had the effect of changing existing law. Where the exemption has been in existence for forty years, where the reasons for the exemption continue to exist, where alternate remedial legislation has been provided, and where the legislation in question (the ICC regulatory exemption) is unrelated to the reasons for the FLSA overtime exemption, it is not necessary to find express legislative history of Congressional intent not to change the FLSA overtime exemption. On the contrary, as the Third Circuit found, if Congress intended to change this longstanding exemption for railroads like NJ Transit "one 'would normally expect some expression by Congress that such results were intended.' *United States v. United Continental Tuna Corp.*, 425 *U.S.* 164, 169 (1976)." (Pet. 11a)

While petitioner does not dispute that the FLSA overtime exemption is part of a broad based statutory scheme which treats railroad workers and their employers differently than other industrial workers, and there is no rational nexus between the exemption from ICC regulation and the Fair Labor Standards Act overtime exemption, it offers no evidence of Congressional intent to affect the FLSA overtime exemption with the passage of 49 *U.S.C.* § 10504. Instead, petitioner speculates, as did the dissent below, that even though there was no rational nexus between the ICC exemption and the FLSA exemption, the elimination of the FLSA exemption was a *quid pro quo* for the provision of the ICC exemption. Because no such expression of intent can be found in either the clear langauge of the statute or the statutory history, petitioner's speculation of Congressional horse trading does not provide a basis for finding that Congress intended to change the application of the FLSA overtime exemption when it exempted certain commuter railroads from Interstate Commerce Commission jurisdiction. This is especially true where consideration of the purpose of 49 *U.S.C.* § 10504 (b) as well as the statutory history and purpose of related statutes requires a contrary result.

———o———



CONCLUSION

For the foregoing reasons, respondent New Jersey Transit Corporation respectfully submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent
New Jersey Transit Corporation
JAMES J. CIANCIA
Assistant Attorney General
Of Counsel
JEFFREY BURSTEIN
Deputy Attorney General
Counsel of Record
ROBERT H. STOLOFF
Deputy Attorney General
On the Brief

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil 85-2420

N.J. TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 304,	)	
Plaintiff,	)	Transcript of Proceedings
v.	)	
	)	OPINION
NEW JERSEY TRANSIT CORPORATION,	)	
Defendant.	)	

Newark, New Jersey
January 13, 1986

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

Appearances:

(No appearances.)

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

Howard A. Rappaport, Official Court Reporter

Plaintiff New Jersey Transit Policemen's Benevolent Association brought this action against defendant New Jersey Transit Corporation seeking retroactive and future straight-time and overtime compensation for certain duties performed by New Jersey Transit police officers. On October 15, 1985, I ruled on defendant's motion to dismiss

the complaint or, in the alternative, to grant summary judgment in favor of defendant. I denied defendant's motion to dismiss the claims for straight-time and overtime compensation and found it inappropriate to rule on defendant's motion for summary judgment on those issues at that time. I dismissed or granted summary judgment against plaintiff's other claims. Defendant now moves for reargument on the question whether it is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) at 29 U.S.C. Section 207 in light of 29 U.S.C. Section 213(b)(2) and 49 U.S.C. Section 10504(c). Defendant also moves for summary judgment against plaintiff on its claim pursuant to 29 U.S.C. Section 206, the minimum wage law.

Statement of Facts

I shall not recount the facts or set out the various pertinent statutory provisions in detail since both items are outlined in my opinion of October 15, 1985. Briefly, defendant's motion for reargument turns on the interpretation of 49 U.S.C. Section 10504 which exempts certain local public mass rail transportation bodies from being subject to the jurisdiction of the Interstate Commerce Commission (ICC). Employers engaged in the operation of a common carrier by rail which *are* subject to the provisions of Part I of the Interstate Commerce Act (ICA) are exempted from the overtime rules of the FLSA. 29 U.S.C. Section 213(b)(2). Since I found that defendant New Jersey Transit Corporation is not subject to the provisions of the ICA in accordance with 49 U.S.C. Section 10504(b) and, further, that the FLSA exemption codified at 29 U.S.C. Section 213(b)(2) is not encompassed by the

savings clause at 49 U.S.C. Section 10504(c), I held plaintiff could maintain an action under the FLSA for overtime compensation.

With regard to the motion for summary judgment, plaintiff's complaint makes out the elements of a violation of the minimum wage law. 29 U.S.C. Section 206. It alleges

> Paragraph 11. Additionally, Police Officers are often required to report to work before the official start of a work shift in order to be present at a roll call to familiarize them with ongoing police activities.
>
> Paragraph 12. While attendance at roll call is mandatory, the defendant has refused to pay any compensation or overtime for this time worked.

I denied defendant's motion to dismiss this claim on October 15, 1985 and declined to rule on defendant's alternate motion for summary judgment finding it inappropriate to do so absent any evidence in the record on this matter. Both parties have since submitted affidavits in connection with this motion. Defendant's affidavits and moving papers demonstrate that it does not conduct a roll call at the beginning of each shift. Moreover, defendant contends that police officers represented by plaintiff are not required to report to work until the beginning of their shift and are paid from the time they report. Plaintiff now concedes that defendant does not conduct a mandatory roll call but contends that defendant's rules and regulations constitute a requirement that all police officers report at least fifteen minutes prior to commencing active duty. Specifically, plaintiff argues that all police officers must report to work early in order to familiarize them-

selves with all Rules and Regulations, inspect equipment, read bulletin boards, and receive information.

Discussion

I. Motion for Reargument

Defendant's motion for reargument raises four issues, several of which were not raised by the parties previously and have not yet been considered by the Court. I shall discuss each item.

1. *Social and labor legislation of the railroad industry.*

Defendant's first contention is that 29 U.S.C. Section 213(b)(2) and 49 U.S.C. Section 10504(b) and (c) must be "read in the context of the panoply of laws that apply to railroads, including NJ Transit," which demonstrates that the "exemption from the overtime provision of the FLSA found in Section 213(b)(2) is applicable" to defendant. Defendant's Brief at 3. Defendant argues that railroads, such as it, are subject to a scheme of labor and social legislation that treats railroad employees differently from other industrial employees. In particular, defendant notes that it is subject to the Railway Labor Act, 45 U.S.C. Section 151, the Railroad Retirement Act, 26 U.S.C. Section 3231, the Railroad Unemployment Insurance Act, 45 U.S.C. Section 351, the Federal Employee Liability Act, 45 U.S.C. Section 51, and the Hours of Service Law, 45 U.S.C. Section 61.

It is true that defendant is subject to several statutes particular to the railroad industry. But this fact alone is not probative as to whether the overtime exemption to the FLSA applies to defendant. Unlike that exemption,

none of the above statutes requires that defendant be subject to the provisions of Part I of the ICA for their terms to apply. Therefore, defendant's argument is not compelling.

2. *Repeal of statutes by implication.*

Defendant also argues that repeal of statutes by implication is disfavored, and a finding that it is no longer covered by the FLSA exemption would violate that rule of statutory construction. The United States Supreme Court's ruling in *United States v. United Continental Tuna,* 425 U.S. 164 (1976), most strongly supports this contention.

Continental Tuna involved a suit by owners of a private fishing vessel, which collided with a naval destroyer of the United States, brought against the United States under the Suits in Admiralty Act, 46 U.S.C. Section 741, and the Public Vessels Act, 46 U.S.C. Section 781. Prior to 1960, suits involving public vessels, such as a naval destroyer, could not be maintained under the Suits in Admiralty Act. They were governed by the Public Vessels Act which contains significant limitations on the power of subpoena over officers and members of the crew of a public vessel and enables the Secretary of the Navy to obtain a stay of any suit under the Act when it appears that prosecution of the suit would tend to interfere with naval operations. Additionally, interest on judgments does not accrue prior to the time of judgment under the Public Vessels Act. However, plaintiff sought to bring an action against a public vessel under the Suits in Admiralty Act claiming such actions were maintainable un-

der the newly amended Admiralty Act. Prior to 1960 the Admiralty Act covered merchant vessels, not public vessels, as follows:

> in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant vessel.* . . .

Id. at 166-167 (emphasis added). The 1960 amendment deleted the language underlined above. Thus, the statute no longer distinguished between merchant and public vessels on its face, and the Ninth Circuit permitted an action involving a public vessel to be brought under it.

The Supreme Court reversed noting that since the 1960 amendment to the Admiralty Act contained "no language expressly permitting claims previously governed by the Public Vessels Act to be brought under the Admiralty Act, free from the restrictive provisions of the Public Vessels Act," plaintiffs were "urg(ing) the effective repeal of those provisions . . . as a matter of implication." *Id.* at 168. Such a ruling would violate the "cardinal principle of statutory construction that repeals by implication are not favored." *Id.* The Court refused to infer that Congress intended to authorize the effective repeal of the Public Vessels Act by the 1960 amendments to the Admiralty Act absent some expression of intent. Since the Court found no such expression, it ruled that claims within the scope of the Public Vessels Act remain subject to its terms even after the 1960 amendment. *Id.* at 181.

Continental Tuna is instructive for several reasons: it reinforces the general rule that repeal by implication is disfavored; and, it applies that rule to actual and effective repeals of statutes. While the holding and reasoning of *Continental Tuna* are persuasive, the case is not controlling because 49 U.S.C. Section 10504 does not repeal 29 U.S.C. Section 213(b)(2)—either actually or in effect. 29 U.S.C. Section 213(b)(2) remains in effect as written. It has not been narrowed or made capable of evasion by 49 U.S.C. Section 10504. Its requirement that an employer be subject to the provisions of Part I of the ICA remains in force. The fact that defendant and others similarly situated no longer meet this condition, by virtue of 49 U.S.C. Section 10504, does not present the same situation as in *Continental Tuna* where a broader, general statute threatened to swallow a specific one. Rather, 49 U.S.C. Section 10504, a specific statute, does not provide alternate statutory treatment that conflicts with 29 U.S.C. Section 213(b)(2); it makes defendant and others ineligible for Section 213(b)(2). Accordingly, I find that the doctrine of *Continental Tuna* does not apply to this case.

3. *"Plain language"*

Defendant correctly notes that the Court's October 15, 1985 opinion focused on the phrase "applicable laws of the United States" in construing the scope of the savings clause at 49 U.S.C. Section 10504.[1] Defendant now

---

[1] The full text of 49 U.S.C. Section 10504(c) is as follows:

(c) Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United States related to—

(Continued on following page)

urges the Court to focus on the last phrase of Section 10504(c)(3): "or other provisions related to dealings between employees and employers." Defendant contends that this language should be considered as a separate phrase, and not as part of subsection (c)(3).[2] The savings clause would then read in part: " . . . a local public body, described in subsection (b), is subject to . . . any other provisions pertaining to dealings between employees and employers." Defendant argues that the FLSA's overtime exemption, Section 213(b)(2), is thus still applicable to New Jersey Transit since the clause is a "provision related to dealings between employees and employers." Defendant's Brief at 7-9.

The primary reason defendant proposes for focusing on the phrase "other provisions . . ." apart from other "applicable laws" referred to in the statute is that the present and prior versions of Section 10504(c) do "not make sense" and are awkward if another reading is used. (The clause would read: ". . . a local public body, described in subsection (b), is subject to applicable laws of the United States related to" other provisions related to dealings between employees and employers.") I am not convinced by defendant's tortured solution to this problem. It is true that the language "other provisions *related*

(Continued from previous page)

(1) safety;

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and employment systems or other provisions related to dealings between employees and employers.

[2] See opinion of October 15, 1985 for the significance of this distinction.

to . . ." is redundant if read as part of the phrase beginning with "applicable laws," but "legislative grammar often falls far short of accurately expressing the legislative intent." *Condon v. Finch,* 305 F. Supp. 63, 64 (1969). Thus the grammatical awkwardness of the statute does not justify rewriting it or reinterpreting it in a way that arguably alters its scope. (This analysis applies to prior versions of Section 10504(c) as well.)

Even if it were proper to consider separately the phrase defendant focuses on, I find the alternate reading of the statute suggested does not compel a different outcome in this case. Defendant argues "it is clear" that Section 213(b)(2) is a "provision related to dealings between employees and employers." Defendant's Brief at 9. Specifically, it notes that Section 213(b)(2) contains the terms "employee" and "employer." Nonetheless, the exemption to the overtime provision of the FLSA is not a "dealing" between employees and employers. Webster's Dictionary defines "dealings" as "friendly or business interactions." *Webster's Ninth New Collegiate Dictionary,* "dealing," p1, at 327. The concept includes, for example, negotiations between employees and employers over a collective bargaining agreement. It does not encompass a rule imposed by Congress on overtime pay. Such a regulation does not constitute an interaction between employees and employers. Therefore, 29 U.S.C. Section 213(b)(2) does not fall within defendant's suggested reading of 49 U.S.C. Section 10504(c), and the overtime exemption is not saved by the plain language of Section 10504(c).

4. *Congressional intent*

Defendant argues finally that there is "no plausible explanation as to why Congress would have intended to

change the applicability of the exemption from the overtime provisions when it changed the application of the Interstate Commerce Act." Reply Brief at 7. Defendant contends that the reference to the ICA in Section 213(b)(2) was intended as a "short-hand for defining all railroad workers." Brief at 13. Therefore, any change in New Jersey Transit's status vis-a-vis the ICA should not remove its exemption from the FLSA's overtime rules.

In support of this argument defendant relies on a speech of Congressman Mead cited in *Keele v. Union Pacific Railroad Company*, 78 F. Supp. 678 (1948). Congressman Mead stated that the proposed exemption would "eliminate all railroad workers from provisions of this bill." *Id.* at 682. Statements made by individual legislators serve only as "guidance", however, since they pose a risk of possibly "misreading Congress' purpose." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The *Keele* court's analysis of the overtime exemption as applied elsewhere is more persuasive. It cites several cases in which railroad employees, including those engaged in tasks which could be performed by outside contractors such crude oil production, were excluded from the overtime requirement of the FLSA when their employer was subject to the jurisdiction of the ICA but not when such jurisdiction was lacking. *Keele, supra* at 683-684. The court concluded:

> this court should not attempt to modify, or read into the plain language of the statute, words or meaning not expressed therein. It is the opinion of this court that the statute is as clear as the English language can make it. . . .

Id. at 685.

I, too, am not inclined to read Section 213(b)(2) as meaning anything other than what it says: to be eligible for the exemption from the overtime rules, the employer-railroad must be subject to the provisions of the ICA. Defendant maintains that Congress intended to exempt railroad employees generally by Section 213(b)(2) because of the irregular work hours in the railroad industry. But Congress did not use general language. Essentially, defendant is asking the Court to find that Congress has no reason for making ICC jurisdiction over an employer a condition of the overtime exemption. Although it is difficult to identify Congress' logic, that does not justify deviating from the specific, precise terms and conditions Congress has set forth. Since defendant is no longer subject to the jurisdiction of the ICC it cannot meet these terms and is no longer within the scope of Section 213(b)(2).[3]

II. *Motion for summary judgment*

In order to prevail on a motion for summary judgment, the moving party must prove that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. All evidence must be viewed in a light most favorable to the party opposing the motion. *Wahl v. Rexnord,* 624 F.2d 1169, 1181 (3d Cir. 1980). However, the opposing party may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts

---

[3] Defendant's reliance on *Southland Gas Co. v. Bayley,* 319 U.S. 44 (1943) is also not helpful. In *Southland* the Supreme Court stated, in dictum, that the overtime exemption "exempt(s) the railroad employees *covered by (its) provision.*" *Id.* at 49 (emphasis added).

showing a genuine issue for trial. *Delong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1139 (3d Cir. 1980).

Plaintiff's response to defendant's motion for summary judgment consists of an affidavit submitted by James Dunn, Chief Representative of plaintiff Local 304. Mr. Dunn refers to but does not quote various rules and regulations in his affidavit. Had defendant not submitted relevant copies of these rules in reply, I would have been unable to determine whether they present material disputed issues of fact and would have granted defendant's motion without reaching the merits. Moreover, plaintiff concedes in its brief that defendant "does not have 'roll call' in the customary sense of the word." Plaintiff's Brief at 4. This admission directly conflicts with plaintiff's earlier allegations in its complaint. But even if I were to find that the pleading sufficiently covers the " 'roll call' type early reporting requirement" plaintiff now complains of, Mr. Dunn's affidavit does not set forth specific facts showing a genuine issue for trial. *Id.*

Plaintiff argues its members are required to report to work early to complete four activities:

(1) *familiarize oneself with all rules and regulations.* Dunn Aff., Paragraph 3. Rule 6.6 of the N.J. Transit Rail Operations, Police Department, Patrol Guide addresses this issue as follows:

> Upon returning to duty from any period of absence, all officers shall inform themselves about all new orders, regulations, memoranda, and all other important matters governing their assignments. Every officer in the Department shall familiarize himself/herself with all the laws, statutes, ordinances, and regulations necessary for the proficient execution of his/her duty as a police officer.

Affidavit of Werner Ropers, Paragraph 4, Ex. A;

(2) *inspect safety equipment.* Dunn Aff., Paragraph 5. Safety Rule 8028 provides that:

> Employees to whom company personal protective equipment has been issued will be responsible for: (a) Care and maintenance of the equipment. They are prohibited from misusing, abusing or making any alteration or modification thereto. (b) Inspection of the equipment prior to using. If found defective, it must not be used but reported to proper authority for repair or replacement.

Werner Aff., Paragraph 6, Ex. B;

(3) *read bulletin boards.* Dunn Aff., Paragraph 6 NJ Transit Rail Operations, Police Department, Administrative Memorandum P.S.-84-009 states:

> All Officers are required to check the bulletin board in the hallway adjacent to the CCTV Room for new instructions, memos, and announcements on a daily basis.

Werner Aff., Paragraph 7, Ex. C; and

(4) *receive information from officers about to go off duty.* Dunn Aff., Paragraph 4. Rule 6.8 of the Patrol Guide requires:

> All officers shall transmit all official communications promptly, accurately and completely to other officers of the Department as required, and shall immediately inform their Supervisor of any matter of police importance coming to their attention during the tour of duty, or otherwise call to the attention of their relieving officers any information regarding unresolved matters/problems or matters/problems that may arise during the next tour of duty.

Werner Aff., Paragraph 5, Ex. A.

None of these rules of memoranda require plaintiff's members to perform tasks *prior* to the beginning of their work day. Nor has plaintiff demonstrated that any of its members have been disciplined for failing to perform the above duties prior to active duty. James Dunn avers that Police Officer Charles Goldston was suspended for 30 days for failing to read a bulletin board. Dunn Aff., Paragraph 8. But Mr. Dunn does not claim that this suspension resulted from Goldston's failure to read the board prior to the beginning of the work day. In fact, the item Officer Goldston failed to read had been posted for several days and could have been read during his tour of duty. Warner Aff., Paragraph 8, Ex. D.

Mr. Dunn avers that he "keeps abreast" of defendant's rules and regulations as well as "all unwritten customs and practices of New Jersey Transit as they affect members" of plaintiff. Dunn Aff., Paragraph 1. If plaintiff's members do report fifteen minutes early to perform certain tasks, it appears from the evidence in the record that their custom is not required by defendant. Defendant's Inspector of Police, Werner Ropers, avers that the requirements of Rules 6.6 and 6.8 Safety Rule 8028, and Administrative Memorandum P.S.-84-009 can properly be complied with during an officer's tour of duty. Werner Aff., Paragraphs 4-8. Since the language of the rules does not compel "early reporting," and because plaintiff has offered no other evidence to prove its allegations, no specific facts showing a genuine issue for trial have been presented. Accordingly, defendant's motion for summary judgment on the minimum wage claim is granted.

Conclusion

Defendant's new arguments do not demonstrate that the exemption from the FLSA is applicable to it. Accordingly, defendant's motion for reargument is denied.

Neither plaintiff's submissions nor defendant's rules and regulations demonstrate that defendant maintains a "'roll call' type early reporting requirement." Defendant's motion for summary judgment on the minimum wage claim is therefore granted.

Counsel for defendant is requested to submit an appropriate form of order.